



Federal Communications Commission
Washington, D.C. 20554

March 16, 2010

DA 10-444

In Reply Refer to:

1800B3-ATS

Released: March 16, 2010

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In Re: The Helpline
New NCE (FM), Athens, Ohio
Facility ID No. 175139
File No. BNPED-20071019BCG

Petition for Reconsideration

Dear Mr. Fitch:

We have before us a Petition for Reconsideration (“Petition”) filed on April 30, 2009, by The Helpline (“Helpline”), seeking reconsideration of the staff’s decision regarding its application for a new noncommercial educational (“NCE”) FM facility in Athens, Ohio (“Athens Application”). For the reasons set forth below, we deny the Petition.

Background. Helpline was among thirteen mutually exclusive applicants for an NCE FM station construction permit.¹ These applications, which propose to serve eight different communities in Ohio, were designated NCE MX Group 396. Pursuant to established procedures,² on March 31, 2009, the Media Bureau (“Bureau”) determined that the Ohio East-West Cultural Bridge (“Ohio”) application³ for a new NCE FM station in Johnstown, Ohio, was entitled to a decisive preference under Section 307(b) of the Communications Act of 1934, as amended (“Act”),⁴ and identified Ohio as the tentative selectee in NCE MX Group 396.⁵

¹ See *Threshold Fair Distribution Analysis of 21 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations Filed in October 2007 Window*, Memorandum Opinion and Order, 24 FCC Rcd 3873, 3882 (MB 2009) (“2009 Fair Distribution MO&O”).

² See 47 C.F.R. § 73.7002 (procedures for selecting among mutually exclusive applicants for stations proposing to serve different communities); see also *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386 (2000) (“NCE Comparative Order”); Memorandum Opinion and Order, 16 FCC Rcd 5074, 5105 (2001) (“NCE Comparative MO&O”), reversed in part on other grounds, *NPR v. FCC*, 254 F.3d 226 (D.C. Cir. 2001).

³ File No. BNPED-20071018AHQ.

⁴ 47 U.S.C. § 307(b). A Section 307(b) analysis is ordinarily conducted at the staff level because the Bureau has delegated authority to make Section 307(b) determinations in NCE cases. See *NCE Comparative Order*, 15 FCC Rcd at 7397.

⁵ See *2009 Fair Distribution MO&O*, 24 FCC Rcd at 3891.

In its Petition, Helpline seeks reconsideration of the *2009 Fair Distribution MO&O*. Helpline specifically states that it is not challenging the Bureau's tentative selection of the application filed by Ohio. Rather, Helpline argues that its Athens Application is also grantable since its Athens proposal is not mutually exclusive with Ohio's Johnstown proposal.⁶ Helpline further argues that it would promote the public interest to grant its Athens Application in addition to Ohio's. Helpline proffers that grant of its Athens Application is now made possible by the settlement agreement it has recently reached with St. Gabriel Radio, Inc. ("St. Gabriel"), the only application in NCE MX Group 396 with which it is mutually exclusive ("Settlement Agreement").⁷

Discussion. We initially note that the *2009 Fair Distribution MO&O* against which reconsideration is sought took no action with regard to any of the underlying applications in NCE MX Group 396. Confirming the interlocutory nature of the *2009 Fair Distribution MO&O*, the Bureau repeatedly emphasized that the selection of Ohio was "tentative" and took no final action on either the Ohio or Helpline applications.⁸ Section 1.106(a)(1) of the Commission's Rules specifically prohibits petitions for reconsideration of such interlocutory orders.⁹ Shortly after Helpline filed the Petition however, the Bureau granted the Ohio application¹⁰ and dismissed the Helpline Athens Application.¹¹ Because its arguments were not considered prior to dismissal, we will treat Helpline's Petition as a request for reconsideration of the Athens Application dismissal. Based on controlling Commission case law, we deny the Helpline Petition.

In the *NCE Comparative MO&O*, the Commission considered a geographic-based processing proposal that would have sanctioned the tentative selection of more than one applicant in a mutually exclusive application group.¹² The Commission rejected this proposal, noting that although it might be beneficial to select more than one applicant, doing so could potentially result in the selection of an inferior applicant as a secondary selectee.¹³ Instead, the Commission determined that the better approach would be to dismiss all non-selected applicants in a group, even if a particular application is not mutually

⁶ Petition at 2.

⁷ The St. Gabriel application (File No. BNPED-20071022AIU) proposes the use of Channel 201 in Zanesville, Ohio. The Settlement Agreement was executed on April 29, 2009, and filed concurrently with the Petition on April 30, 2009.

⁸ See *2009 Fair Distribution MO&O*, 24 FCC Rcd at 3891 (explaining that "[Ohio] is . . . TENTATIVELY SELECTED to be awarded a construction permit for a new NCE FM station in Johnstown, Ohio. If, after a 30-day petition to deny period has run, there is no substantial and material question concerning the grantability of the tentative selectee's application, we intend, by public notice TO DISMISS the mutually exclusive applications . . ."). The 30-day petition to deny period expired on April 30, 2009. A December 1, 2007, petition to deny the Ohio application filed by the American Family Association was dismissed by public notice on May 13, 2009, pursuant to the petitioner's December 20, 2007, withdrawal request.

⁹ See 47 C.F.R. § 1.106(a)(1). See also *State of Oregon*, Letter, 23 FCC Rcd 11576 (MB 2008).

¹⁰ See *Broadcast Actions*, Public Notice, Report No. 46987 (MB May 18, 2009).

¹¹ See *Broadcast Actions*, Public Notice, Report No. 46984 (MB May 13, 2009).

¹² *NCE Comparative MO&O*, 16 FCC Rcd at 5104.

¹³ *Id.* at 5105 (" . . . after the best qualified applicant is selected, it is possible that remaining applicants that are not mutually exclusive with this primary selectee and thus potentially secondary selectees, may also be significantly inferior to other applicants that are eliminated because they *are* mutually exclusive with the primary selectee. Rather than issue authorizations to applicants whose potential for selection stems primarily from their position in the mutually exclusive chain, we believe it is appropriate to dismiss all of the remaining applicants and permit them to file again in the next filing window.") (emphasis in original).

exclusive with the primary selectee of the group.¹⁴ Therefore, in keeping with the Commission's processing guidelines, we reject Helpline's contention that its application should also be granted based solely on its position in the mutually exclusive chain and the absence of any direct conflict with the tentative selectee, Ohio.

We also dismiss the Settlement Agreement between Helpline and St. Gabriel. Approval of the Settlement Agreement would not serve the public interest primarily because a principal term of the Settlement Agreement requests that we grant Helpline's Athens Application. In light of our determination that Helpline's Athens Application should not be granted, the Settlement Agreement cannot be fully implemented and we therefore dismiss it.

Conclusion/Actions. Accordingly, IT IS ORDERED, that the Petition for Reconsideration filed on April 30, 2009, by The Helpline IS DENIED. IT IS FURTHER ORDERED that the Settlement Agreement filed by Helpline and St. Gabriel IS DISMISSED. Helpline may refile the application in the next available NCE filing window.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: The Helpline
Ohio East-West Cultural Bridge
John Trent, Esq.

¹⁴ *Id.* The Commission recently reiterated that only one application from each mutually exclusive group would be granted and that the remaining applications, even if not mutually exclusive with the tentative selectee, should be dismissed. See *Comparative Consideration of 59 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educational FM Stations Filed in the October 2007 Filing Window*, Memorandum Opinion and Order, FCC 10-29, at ¶ 139 (rel. Feb. 16, 2010) ("Finally, we note that we previously concluded that only one application should be granted out of each mutually exclusive group, while providing the competing applicants the opportunity to file again in the next filing window. Accordingly we direct the staff to deny petitions for reconsideration based on the theory that the dismissed application is not mutually exclusive with the granted application." (internal citations omitted)).